University of Baltimore Law Review

Volume 23
Issue 2 *Spring 1994*

Article 3

1994

Suits against State Officials for Damages for Violations of Constitutional Rights: Comparing Maryland and Federal Law

Stephen J. Shapiro
University of Baltimore School of Law, sshapiro@ubalt.edu

SUITS AGAINST STATE OFFICIALS FOR DAMAGES FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS: COMPARING MARYLAND AND FEDERAL LAW

Stephen J. Shapiro†

I. INTRODUCTION

In the 1961 case of *Monroe v. Pape,*[1] the United States Supreme Court allowed the use of a one hundred year old federal statute, 42 U.S.C. § 1983,[2] (hereinafter Section 1983) to award damages to a plaintiff whose constitutional rights had been violated by members of the Chicago Police Department.[3] This ruling, coupled with the expansion of constitutional rights which occurred during the 1960s,[4] has led to what some commentators have termed an "explosion" of

---

† Professor of Law at the University of Baltimore School of Law; B.A., Haverford College, 1971; J.D., University of Pennsylvania, 1976.

1. 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Social Servs. of New York, 436 U.S. 658 (1978).
2. This statute provides:

   > Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

   42 U.S.C. § 1983 (1994).
3. *See supra* notes 1-2, *infra* notes 37-41, 45-47 and accompanying text (discussing the *Monroe* case).
4. *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (strengthening free speech rights of students); New York Times v. Sullivan, 376 U.S. 254 (1964) (strengthening citizens' freedom of speech and of the press); Sherbert v. Verner, 374 U.S. 398 (1963) (strengthening citizens' right to free exercise of religion); Baker v. Carr, 369 U.S. 186 (1962) (reaffirming every citizen's right to vote free from impairment by arbitrary state action). This general expansion of constitutional rights did not end abruptly, but continued, at least to a certain extent, beyond 1970. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (expanding the constitutional right to privacy to include the right to an abortion).

federal lawsuits to redress violations of constitutional rights.[5]

Recently, the Supreme Court has been less willing to expand the scope of many constitutional rights,[6] and has, in fact, cut back on the reach of others.[7] This has led some civil rights litigants to turn to state courts in the hope of receiving broader rights under state constitutions.[8]

In Maryland, the court of appeals has not expanded the scope of rights under the Maryland Declaration of Rights[9] beyond the scope

---

5. Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6 (1980); *see also* Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, Part I, 60 VA. L. REV. 1 (1974) (stating that "private rights of actions based on 42 U.S.C. § 1983 are flooding the federal courts"). *But see* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642, 689-95 (1987) (maintaining that although the overall number of civil rights cases has greatly increased, that most of this increase can be attributed to suits brought under new civil rights statutes such as Title VII, and to prisoners' habeas corpus petitions; as a result, the increase in what he terms "Constitutional Tort Claims"—suits for damages for violation of constitutional rights—have had only a very modest increase).
6. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (refusing to extend special First Amendment protection to personal opinions); Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to extend constitutional protection to private, consensual, homosexual activity); Hudson v. Palmer, 468 U.S. 517 (1984) (refusing to extend Fourth Amendment privacy rights to prisoners). Nevertheless, there have been cases within the last 10 years where the Court has expanded constitutional rights. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (extending First Amendment protection to flag burning); Tennessee v. Garner, 471 U.S. 1 (1985) (expanding rights of fleeing felons).
7. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (confirming a state's power to restrict a woman's right to an abortion); Employment Div. v. Smith, 494 U.S. 872 (1990) (restricting the right to free exercise of religion); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (restricting the First Amendment rights of students).
8. *See* James G. Exum, *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741 (1992) (arguing that a state court interpreting its constitution may give greater, but not lesser, protection to individual liberties than required by the United States Constitution); Daniel R. Gordon, *Progressives Retreat: Falling Back from the Federal Constitution to State Constitutions*, 23 ARIZ. ST. L.J. 801, 815 (1991) (arguing that progressives should take their constitutional litigation to state courts to avoid federal court conservatism). This trend was accelerated by an influential article by former Supreme Court Justice William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), which has been referred to as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983). Burt Neuborne, who argued in 1977 that federal courts were more suited to protect individual rights, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), has more recently espoused the importance of state constitutions. Burt Neuborne, *Forward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 901 (1989).
9. MD. CODE ANN., CONST. arts. 1-46 (1867).

of their counterparts under the federal Bill of Rights.[10] Therefore, a plaintiff wishing to sue a state official for a violation of the Maryland Declaration of Rights would often gain no substantive advantage by filing the suit in a Maryland state court rather than in a federal court.[11] Differences do exist between Maryland and federal courts, however, in the extent of immunities from damages afforded defendants.[12] These differences may give plaintiffs filing in Maryland state court a distinct advantage over those filing in federal court when bringing suit against a state official for violations of the Maryland Declaration of Rights.

In a number of rulings interpreting Section 1983 itself, as opposed to the constitutional rights it protects, the Supreme Court has limited the scope of this remedy.[13] The result of such rulings has been that in some cases, even if plaintiffs prove that government officials have violated their constitutional rights, they are left without a statutory remedy.[14]

Suits against state and local officials under Section 1983 are classified either as official capacity or personal capacity suits.[15] Of-

---

10. "[T]he Constitution of Maryland and the Constitution of the United States have been construed similarly with respect to many individual rights." Charles A. Rees, *State Constitutional Law for Maryland Lawyers: Individual Civil Rights*, 7 U. BALT. L. REV. 299 (1978). Many provisions of the Maryland Declaration of Rights, violation of which could lead to a damage lawsuit, have been read *in pari materia* with their federal counterparts. For example, Article 40 of the Maryland Declaration of Rights has been equated with the free speech provision of the First Amendment. Landover Books, Inc. v. Prince George's County, 81 Md. App. 54, 76, 566 A.2d 792, 803-04 (1989). The Due Process Clauses of the two Constitutions are to be given similar, although not necessarily identical, interpretations. Attorney General v. Waldron, 289 Md. 683, 704-05, 426 A.2d 929, 941 (1981). Decisions of the United States Supreme Court should be treated as "persuasive authority" when interpreting the Maryland Due Process Clause. Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 640, 458 A.2d 758, 781 (1983). The Fourth Amendment protection against unreasonable searches and seizures is read *in pari materia* with Article 26 of the Maryland Declaration of Rights, Gahan v. State, 290 Md. 310, 322, 430 A.2d 49, 55 (1981), and no greater protection should be extended under the Maryland provision. Henderson v. State, 89 Md. App. 19, 24, 597 A.2d 486, 488 (1991), *cert. denied*, 325 Md. 396, 601 A.2d 129 (1992).

11. There may, of course, sometimes be a substantive advantage to bringing suit under the Maryland Constitution, such as where there is no corresponding federal right, *e.g.*, there is an Equal Rights Amendment under the Maryland Constitution but not under the federal, or where the federal right has been held not applicable to the states, *e.g.*, the right to a trial by jury in a civil action under the Seventh Amendment.

12. *See infra* notes 33-35 and accompanying text.

13. *See infra* notes 47, 50-51, 64 and accompanying text.

14. *See infra* notes 27-30, 86-88 and accompanying text.

15. Kentucky v. Graham, 473 U.S. 159, 165 (1985); *see also* Brandon v. Holt, 469 U.S. 464, 471 (1985).

ficial capacity suits are brought against government officials who are merely carrying out their duties under an unconstitutional statute or rule.[16] Damages in such suits are collected from the government treasury.[17] Official capacity suits are comparable to suits against the government itself.[18] Damages may be assessed against *local* government officials acting in their official capacity, or against the local governments themselves.[19] No damages may be awarded, however, in suits against *state* officials acting in their official capacity.[20]

Personal capacity suits are brought against government officials who exceed or abuse their authority under state or local law.[21] Under Section 1983, officials who exceed or abuse their authority under state or local law can be held personally liable for damages.[22] The damages are limited, however, by various immunities.[23] Some officials, such as judges, legislators, and prosecutors, enjoy absolute immunity from damages.[24] Most other officials and employees receive qualified, or limited, immunity from damages.[25] Officials with qualified immunity may be held liable only for actions which violated the "settled constitutional rights" of the plaintiff at the time of the action.[26]

---

16. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).
17. *Graham*, 473 U.S. at 166.

> It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Id.

18. *Will*, 491 U.S. at 71. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Brandon v. Holt, 469 U.S. 464, 471 (1985). "As such, it is no different from a suit against the State itself." *Id.*
19. Monell v. Department of Social Servs. of New York, 436 U.S. 658, 690 (1978).
20. *See Will*, 491 U.S. at 67, 71. If brought in federal court, such suits are barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). If brought under § 1983 in state court, they are barred because the state is not considered a "person" under § 1983. *Will*, 491 U.S. at 71.
21. *See* Monroe v. Pape, 365 U.S. 167, 171-72 (1961), *overruled on other grounds by* Monell v. Department of Social Servs. of New York, 436 U.S. 658 (1978).
22. Kentucky v. Graham, 473 U.S. 159, 166 (1985).
23. *Id.* at 166-67.
24. Pierson v. Ray, 386 U.S. 547 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors).
25. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).
26. *Id.* at 818.

In sum, plaintiffs whose constitutional rights have been violated by state officials have no remedy under federal law[27] in the following situations:

(1) When the violation was committed by a state official acting in an official capacity;[28]

(2) when the violation was committed by an official acting in a judicial, legislative, or prosecutorial capacity;[29] or

(3) when the violation was committed by any other official acting in an individual capacity, unless the right had previously been clearly defined by settled law.[30]

Several opinions by the Court of Appeals of Maryland, however, have indicated that the identical circumstances might lead to recovery in Maryland state courts.[31] Although there is no statutory counterpart to Section 1983 in Maryland, the court of appeals has recognized a common-law right of action for violations of certain sections of the Maryland Declaration of Rights.[32] In suits for damages against individual government officials based on violations of constitutional rights, Maryland does not recognize a distinction between suits against officials in their individual versus their official capacities.[33] Damages may be awarded against the official personally in both instances.[34] Also, Maryland does not seem to recognize a qualified immunity for state officials.[35] These two differences between Maryland and federal law may make it possible for plaintiffs to recover in Maryland courts under some of the circumstances where recovery is not allowed under federal law.

This Article will examine the scope of the Maryland rulings in suits against state officials and will compare the results under Maryland law with the results under federal law. It can then be determined in what instances these differences might lead plaintiffs to file suit in Maryland state court rather than federal court. This Article will further explore some questions left unanswered by the Maryland opinions, including: possible unfairness to individual defendants, the role of the State Tort Claims Act,[36] the effect of the rulings on the

---

27. 42 U.S.C. § 1983 (1988).
28. *See supra* notes 16-20 and accompanying text.
29. *See supra* note 24, *infra* notes 77-78 and accompanying text.
30. *See supra* note 26, *infra* notes 80-81 and accompanying text.
31. *See, e.g.*, Ritchie v. Donnelly, 324 Md. 344, 597 A.2d 432 (1991); Clea v. City Council of Baltimore, 312 Md. 662, 541 A.2d 1303 (1988).
32. Widgeon v. Eastern Shore Hosp. Ctr., 300 Md. 520, 535, 479 A.2d 921, 929 (1984).
33. *Ritchie*, 324 Md. at 374-75, 597 A.2d at 446-47 (1991).
34. *Id.* at 374, 597 A.2d at 446.
35. *Id.* at 373, 597 A.2d at 446.
36. MD. CODE ANN., STATE GOV'T §§ 12-101 to 12-110 (1993 & Supp. 1994).

absolute immunity of certain officials, and the application of these principles in cases involving claims under both state and federal law.

II. FEDERAL LAW

In the 1961 decision of *Monroe v. Pape*,[37] the Supreme Court held that Section 1983 provided a damage remedy against members of the Chicago Police Department who had violated the plaintiffs' constitutional rights.[38] In *Monroe*, thirteen police officers entered and ransacked a private home without a search warrant and detained the owner for ten hours without an arrest warrant.[39] The Court found that the defendants had acted "under color of" state law, despite the fact that their actions exceeded their official authority and, in fact, were in violation of state law.[40] The Court refused to impose a state of mind requirement that the defendants' acts be "wilfully" done, stating that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[41]

Despite this broad statement, it has not always been possible to hold government officials and governments responsible for the natural consequences of their actions. Plaintiffs injured by the unconstitutional acts of government officials have been left without damage remedies because the Supreme Court has placed a number of restrictions on Section 1983.[42] Some of these restrictions relate to suits against governmental entities themselves or, similarly, against governmental officers in their official capacity.[43] A different set of restrictions apply when suit is brought against governmental officers in their individual capacity.[44] It is useful to discuss these two lines of decisions separately.

A. Official Capacity Suits

In *Monroe v. Pape*,[45] the plaintiffs sued not only the thirteen Chicago police officers who had broken into their home, but also

---

37. 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Social Servs. of New York, 436 U.S. 658 (1978).
38. *Id.*
39. *Id.* at 169.
40. *Id.* at 187. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
41. *Id.* at 187.
42. *See infra* notes 47, 50-51 and accompanying text.
43. *See infra* Part II.*A*.
44. *See infra* Part II.*B*.
45. 365 U.S. 167 (1961), *overruled in part by* Monell v. Department of Social Servs. of New York, 436 U.S. 658 (1978).

the City of Chicago.[46] The Court held that the city was not a proper defendant, since municipalities were not "persons" under Section 1983.[47]

The Court's *Monroe* holding remained the law until 1978 when the Court reversed itself, in *Monell v. Department of Social Services of New York*,[48] by holding that local governmental entities could be sued under Section 1983.[49] Local governments can only be held liable when the government's "official policy" causes the violation.[50] Moreover, the governmental entity cannot be held liable on a *respondeat superior* theory for the action of its employees and non-policy-making officials.[51]

Although there has been much litigation concerning what constitutes official government policy, the Court has continued to require that a violation be caused by official policy for recovery against municipal governments.[52] This requirement presents certain difficulties

---

46. *Id.* at 169-70.
47. *Id.* at 187-91, *overruled by* Monell v. Department of Social Servs. of New York, 436 U.S. 658 (1978). The Court took this position as a matter of statutory construction, despite the fact that the Dictionary Act provided that "the word 'person' may extend and be applied to bodies politic and corporate." Act of February 25, 1871, 16 Stat. 431. In reaching its conclusion, the Court relied heavily on the defeat of Senator Sherman's Amendment to the original § 1983, Act of April 20, 1871. This amendment would have made the inhabitants of the county, city, or parish, in which certain acts of violence occurred, liable to pay full compensation to the person damaged or his widow or legal representative. The *Monroe* Court held that "[t]he response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Monroe*, 365 U.S. at 191.
48. 436 U.S. 658 (1978).
49. *Id.* at 683. The Court reexamined the meaning of the defeat of the Sherman Amendment, holding that this showed only that Congress did not want municipalities to be held liable merely because the violation took place within its borders: a duty to keep the peace. However, "nothing said in debate on the Sherman Amendment would have prevented holding a municipality liable under § 1 of the Civil Rights Act for its own violations of the Fourteenth Amendment." *Id.*
50. *Id.* at 694. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*
51. *Id.* at 691. "[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* (emphasis added).
52. *See, e.g.*, Pembaur v. Cincinnati, 475 U.S. 469 (1986) (finding that an ad hoc decision by official with policy-making authority constitutes official policy); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (finding that only actions of those with policy-making authority under state law constitute official government policy).

where the violations, although carried out by an official performing his or her official duties, were not caused by a specific government policy. The only recovery in such cases would be against the official in his or her "individual capacity."[53] There are several problems with such individual capacity suits. First, the official may enjoy absolute or qualified immunity from an assessment of damages, thereby blocking a judgment against him.[54] Second, even if a judgment were obtained, the official might not have the resources to satisfy it.[55] Under either scenario, a plaintiff whose constitutional rights have been violated by a local government official might be left uncompensated.

The situation is worse when the suit is against a state, or a state official acting in an official capacity. According to the Eleventh Amendment,[56] states may not be sued in federal court absent their consent.[57] Therefore, plaintiffs generally may not sue states in federal court under Section 1983 for constitutional violations caused by official state policy.[58]

---

53. *See infra* notes 73-74 and accompanying text.
54. *See supra* notes 24-26, *infra* notes 75-81 and accompanying text.
55. Many municipalities, however, do provide either indemnification or insurance against such judgments for their employees. This protects the employees from unfairness and provides the plaintiffs with a source of funds for recovery. There are, however, often limits on the amount of such insurance or indemnification. *See* PETER LOW & JOHN JEFFRIES, CIVIL RIGHTS ACTIONS 49 (1988).
56. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.
57. Hans v. Louisiana, 134 U.S. 1, 3 (1890). Although the Eleventh Amendment, by its terms, seems only to prohibit suits against a state by a citizen of another state or of a foreign state, it has consistently been interpreted also to prohibit suits by citizens of the same state. *Id.* at 15. A state may, however, waive its Eleventh Amendment protection and consent to suit in federal court. *Id.* at 17; Clark v. Barnard, 108 U.S. 436, 447 (1883). Such consent may be made by the state legal representative or by statutes. Such statutes will be narrowly construed. *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 579 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 465-66 (1945).
58. The *Hans* Court rejected the argument that the Eleventh Amendment did not bar suits for constitutional violations. Hans v. Louisiana, 134 U.S. 1, 10-15 (1890). However, four Supreme Court Justices and several commentators have taken the position that the Eleventh Amendment bars only diversity suits, not suits based on constitutional violations. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 260-80 (1985) (Brennan, J. dissenting, joined by Blackmun, Marshall, and Stevens, JJ.); *see also*, Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977); Frederic S. LeClerq, *State Immunity and Federal Judicial Power-Retreat from National Supremacy*, 27 FLA. L. REV. 361, 381-83 (1975); Peter W. Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293 (1980).

In *Edelman v. Jordan*,[59] the plaintiffs attempted to circumvent the Eleventh Amendment by suing the state officials responsible for carrying out state policy instead of the state itself.[60] Instead of administering the programs of Aid to the Aged, Blind, and Disabled (AABD) in accordance with federal regulations, the officials were following Illinois regulations which allowed the Department of Public Aid to delay paying AABD benefits longer than federal law permitted.[61] The plaintiffs sought an injunction compelling the defendants to turn over all AABD benefits wrongfully withheld.[62] Relief was not granted because the damages sought would be paid out of the state treasury, not the personal assets of the state officials.[63] The Court held that when the damages sought will be paid out of a state's treasury, suits against public officials are "official capacity" actions and are to be treated as actions against the state itself.[64]

Congress does have the power to waive the protections of the Eleventh Amendment when using its power under section five of the Fourteenth Amendment.[65] The Supreme Court has held, however, that such waivers must be explicit.[66] The Court has further held that Congress did not intend to waive the states' Eleventh Amendment protection by the passage of Section 1983.[67]

---

59. 415 U.S. 651 (1974).
60. *Id.* at 653.
61. *Id.* at 655.
62. *Id.* at 656. The plaintiffs requested that the Court grant equitable restitution rather than damages, in order to fall within the doctrine of *Ex parte* Young, which allowed suits for injunctive (equitable) relief against state officials. The Court in *Edelman* refused to accept this argument, holding that because the suit was for retrospective relief and would involve money coming from the state treasury to compensate for past wrongs, it did not fall within the *Ex parte* Young exception. *Edelman*, 415 U.S. at 666-68.
63. *Id.* at 663. The Eleventh Amendment does not bar suit, however, if the state official is sued for prospective, injunctive relief, ordering him or her to comply with the United States Constitution. *Ex parte* Young, 209 U.S. 123, 155-56 (1908). In suits for injunctive relief, a state official alleged to be acting in violation of the Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 160. The Court has been unwilling, however, to extend the reasoning of *Ex parte* Young to allow suits for retrospective monetary relief, *Edelman*, 415 U.S. at 655, or to suits to enjoin violations of state law. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).
64. *Edelman*, 415 U.S. at 663.
65. Fitzpatrick v. Bitzer, 427 U.S. 445, 451-56 (1976). To reach this conclusion the Court interpreted section five of the Fourteenth Amendment, which provides that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.
66. Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 474 (1987).
67. Quern v. Jordan, 440 U.S. 332, 338-45 (1979).

In *Will v. Michigan Department of State Police*,[68] the plaintiff attempted to overcome Eleventh Amendment restrictions by suing state officials in their official capacity under Section 1983 in Michigan state court, rather than in federal court.[69] The Eleventh Amendment does not apply to state courts; therefore, suit was not barred on this ground.[70] Nevertheless, the Court held that neither a state, nor a state official acting in an official capacity, is considered a "person" for purposes of a Section 1983 damages action.[71] As with decisions under the Eleventh Amendment, the distinction between official capacity suits for damages, which are not allowed, and individual capacity suits, which may be allowed in some circumstances, is whether the suit is in reality against the state or the individual, regardless of how it is characterized.[72]

B. Individual Capacity Suits

When the constitutional violation is not caused by government policy, but by the actions of an individual official, the suit is considered a "personal-capacity action."[73] Defendants in such cases are usually accused of acting outside the scope of their authority or in violation of state law. Damage awards in such cases can be executed only against the official's personal assets, and not against the government.[74]

All governmental officials, however, enjoy some form of immunity from damages in a Section 1983 action.[75] Some officials have absolute immunity from damages.[76] This immunity is available regardless of the good or bad faith of the official, the egregious nature

---

68. 491 U.S. 58 (1989).
69. *Id.* at 71.
70. *Id.* at 63-64.
71. *Id.* at 71. The Court did, however, distinguish suits for injunctive relief, for which state officials acting in their official capacity *would* be considered persons. *Id.* at 71 n.10. This is in line with the doctrine of *Ex parte Young*, which held that such suits are not barred by the Eleventh Amendment. *See supra* discussion at notes 62-63.
72. *Will*, 491 U.S. at 70-71.
73. Kentucky v. Graham, 473 U.S. 159 (1985); Brandon v. Holt, 469 U.S. 464 (1985).
74. *Graham*, 473 U.S. at 167-68.
75. Section 1983 itself does not contain any mention of immunities. The Supreme Court, however, looking at the legislative history of the statute determined that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Pierson v. Ray, 386 U.S. 547, 554 (1967). Most public officials, therefore, receive similar immunities to that which they would have received at common law. *See supra* notes 24, 25 and accompanying text for officials who are granted immunity from damages actions.
76. *See supra* note 24.

of the violation, or society's reverence for the constitutional right which was violated.[77] These officials will never be held liable for any violation of rights occurring from the exercise of their duties.[78]

Most governmental officials receive "qualified" immunity from damages.[79] Thus, they are protected from liability unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[80] In order for a plaintiff to recover damages, the courts must have recognized the right at the time of the violation, and it must have been sufficiently well established that a reasonable person in the defendant's position would have been aware of it.[81]

The main purpose of such immunities is to allow government officials to act without being paralyzed by the fear of personal liability.[82] But the immunities, especially absolute immunity, have been criticized for providing too much protection to government officials and leaving some plaintiffs without a remedy for constitutional violations.[83] Even qualified immunities have been criticized for

---

77. Stump v. Sparkman, 435 U.S. 349, 356-57, 363-64 (1978). In *Stump*, the Supreme Court upheld the immunity of a state judge who had ordered the sterilization of an unrepresented minor who was told that she was going to have an appendectomy. The Court described the immunity in the broadest possible terms: "This immunity applies even when the judge is accused of acting maliciously and corruptly." Pierson v. Ray, 386 U.S. 547, 554 (1967). The immunity is lost only if the judge acts in the "clear absence of all jurisdiction," *Stump*, 435 U.S. at 357, or becomes only a qualified immunity when the judge is exercising a non-judicial, administrative function. *See* Forrester v. White, 484 U.S. 219 (1988).
78. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 417-18 (1976).
79. Scheuer v. Rhodes, 416 U.S. 232 (1974) (governors and other executive officials); *Pierson*, 386 U.S. at 547 (1967) (police officers).
80. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
81. This so called "objective" standard replaced an earlier subjective standard, which required the official to demonstrate a "good-faith belief" in the legality of his or her actions. *Scheuer*, 416 U.S. at 248. The Court abandoned the subjective good faith standard for the objective one because they felt that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" which would necessarily delve into their "subjective motivation." *Harlow*, 457 U.S. at 817-18.
82. *Scheuer*, 416 U.S. at 240. The Court has recognized that without at least qualified immunity the threat of liability would deter a public official from the "willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* Another rationale for the immunities is to avoid "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion." *Id.*
83. Irene Merker Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833, 853-58 (1978); Jon Evan Waddoups, *Narrowing the Scope of Absolute Judicial Immunity from Section 1983 Suits: The Bar*

protecting defendants in situations where they do not deserve it.[84] Supreme Court precedent has held that unless plaintiff's rights have been sufficiently well established to avoid an immunity, the immunity remains in force regardless of any bad-faith motivation by the defendant and regardless of whether the defendant's action violated established state law guidelines.[85]

C. *Resulting Restrictions on Recovery*

These personal immunities, when coupled with the restrictions on recovery from state and local governments, result in the following situations where plaintiffs have been injured through the unconstitutional actions of state officials, but no compensation, either from the state or from the individual, will be awarded:

(1) When the constitutional violation is *caused by a state statute or policy*;[86] or

(2) when the constitutional violation is *not caused by state statute or policy* and

(a) is committed by an official, such as a judge or prosecutor, enjoying absolute immunity;[87] or

(b) is committed by *any* official if the plaintiff's constitutional right was not clearly established by the courts before the violation.[88]

III. MARYLAND LAW

The Maryland Declaration of Rights[89] contains numerous articles that parallel provisions in the federal Bill of Rights,[90] such as a free

---

Grievance Committee and the Judicial Function, 1990 B.Y.U. L. REV. 1245 (Summer 1990) (arguing against extending absolute immunity to bar grievance committees).

84. Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 140-57, 195 (1991); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 77-80 (1989); Stephen J. Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions under Harlow v. Fitzgerald and its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REF. 249, 266-74 (1989).
85. Davis v. Scherer, 468 U.S. 183, 194-97 (1984).
86. *See supra* note 28 and accompanying text.
87. *See supra* note 29 and accompanying text.
88. *See supra* note 30 and accompanying text.
89. MD. CODE ANN., CONST. arts. 1-46 (1981).
90. U.S. CONST. amends. I-VIII.

speech provision,[91] a due process clause,[92] and a search and seizure clause.[93] Although many of the Maryland articles are worded quite differently than their federal counterparts,[94] the Maryland court of appeals has mainly interpreted most Maryland articles *in pari materia* with the corresponding federal provisions.[95] The court of appeals has held that United States Supreme Court opinions interpreting the federal Bill of Rights are "persuasive" when interpreting the Maryland Constitution.[96]

Although there is no statutory remedy in Maryland similar to Section 1983 for violations of rights provided by the Maryland Constitution, the court of appeals has held that a common-law action for damages is available for such violations.[97] In setting forth the

---

91. MD. CODE ANN., CONST. art. 40 (1981). "That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." *Id.*

92. MD. CODE ANN., CONST. art. 24 (1981). "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." *Id.*

93. MD. CODE ANN., CONST. art. 26 (1981).

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievious [sic] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

Id.

94. *Compare* MD. CODE ANN., CONST. art. 40 (1981) (Maryland Declaration of Rights), *supra* note 91, *with* the free speech provision of the First Amendment to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. *Compare* MD. CODE ANN., CONST. art. 24 (1981) (Maryland Declaration of Rights), *supra* note 92, *with* the Due Process Clause of the Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV. *Compare* MD. CODE ANN., CONST. art. 26 (1981) (Maryland Declaration of Rights), *supra* note 93, *with* the Fourth Amendment to the United States Constitution:

> The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

95. *See* Widgeon v. Eastern Shore Hosp. Ctr., 300 Md. 520, 532, 479 A.2d 921, 927 (1984).

96. *See id.*

97. In *Widgeon*, 300 Md. 520, 479 A.2d 921 (1984), the court found that a common-law action for damages was available to redress violations of Articles 24 and 26 of the Maryland Declaration of Rights (the due process and search and seizure clauses, respectively). *Id.* at 537-38, 479 A.2d at 930. The court

guidelines for common-law actions against state officials, the court of appeals has established different standards of liability than those in a Section 1983 action.[98]

A. Ritchie v. Donnelly

The Court of Appeals of Maryland, in *Ritchie v. Donnelly*,[99] recently restated the law concerning liability of the state and its officials for violations of the state constitution.[100] In *Ritchie*, the plaintiff, who had been dismissed as a deputy sheriff in Howard County, sued the county sheriff in a Maryland circuit court.[101] Ritchie brought a cause of action under Section 1983 for violations of the Equal Protection and Due Process Clauses of the federal Constitution.[102] Ritchie also brought state causes of action for violations of Article 24, the due process clause, and Article 46, the equal rights amendment, of the Maryland Declaration of Rights, as well as various non-constitutional state tort claims.[103]

The trial court, in an action that was affirmed by the court of special appeals,[104] dismissed the plaintiff's Section 1983 claims because the claims were against the sheriff in her official capacity.[105] The trial court reasoned that under federal law, state officials[106] acting in

---

reviewed numerous cases where such actions had been allowed in the past. *Id.* at 525-32, 479 A.2d at 923-27. Although the court limited its holding to Articles 24 and 26, *Id.* at 537, 479 A.2d at 930, there is nothing inherent in the reasoning of the *Widgeon* case that would so limit the rational. In fact, the holding has been extended to the Maryland equal rights amendment, Article 46, which states that "[e]quality of rights under law shall not be abridged or denied because of sex." MD. CODE ANN., CONST. art. 46 (1981) (applied in Ritchie v. Donnelly, 324 Md. 344, 597 A.2d 432 (1991)). There is no reason to believe that the holding will not be extended to other rights provided by the Maryland Constitution.

98. *See infra* notes 99-112 and accompanying text.
99. 324 Md. 344, 597 A.2d 432 (1991).
100. *Id.* at 373-75, 597 A.2d at 446-47.
101. *Id.* at 349-50, 597 A.2d at 434-35.
102. *Id.* at 350, 597 A.2d at 434-35.
103. *Id.* The plaintiff's original complaint contained counts of sexual discrimination, abusive discharge, defamation, intentional infliction of emotional distress, and violations of Articles 24 and 46 of the Maryland Declaration of Rights. *Id.* at 350, 597 A.2d at 434. Her complaint was later amended to include alleged violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and a cause of action under 42 U.S.C. § 1983. *Id.* at 350, 597 A.2d at 435.
104. The court of special appeals issued an unreported opinion. *Id.* at 351, 597 A.2d at 435.
105. *Id.* at 351, 597 A.2d at 435.
106. The lower court held, in an unreported opinion, that the sheriff of Howard County was a state official, rather than a local official. *Id.* at 352, 597 A.2d

their official capacity are not subject to Section 1983 liability.[107] The court of appeals, after an extensive review of the differences between official and individual capacity suits under Section 1983,[108] reversed the dismissal on the grounds that the lower courts had applied the wrong standard and had incorrectly labeled an individual capacity suit as an official capacity suit.[109]

As to the state constitutional claims, the trial court dismissed both claims, again relying on the distinction between official and individual capacity suits. The court held that this was an official capacity suit and therefore barred by sovereign immunity.[110] The court of special appeals affirmed in part and reversed in part, but again relied on the distinction between individual and official capacity suits.[111] The court of appeals held that state law does not allow bifurcation of claims into individual capacity and official capacity.[112] All claims are treated as if they were against the official personally, and therefore the sovereign immunity defense to a federal Section 1983 claim is not allowed in a similar suit relying on Maryland law.

B. The Official Capacity Versus Individual Capacity Distinction

Similar to the federal government, the state itself is immune from suit for constitutional violations.[113] The doctrine of sovereign

---

at 435. The court of appeals noted that under Maryland law, a sheriff is a state official. *Id.* at 357, 597 A.2d at 438. The court also recognized that state law is not dispositive for purposes of a § 1983 action, and that the United States Court of Appeals for the Fourth Circuit, in the case of Dotson v. Chester, 937 F.2d 920, 926-27 (4th Cir. 1991), suggested that a sheriff may be considered a local government official for some purposes. *Ritchie,* 324 Md. at 357, 597 A.2d at 438.

The court of appeals held that it was unnecessary to decide whether the sheriff had been acting as a state rather than local official. *Id.* Both the plaintiff and the defendant had argued that the sheriff was acting as a state official, for purposes of both the § 1983 claims and the state law claims. *Id.* at 357-58, 597 A.2d at 438. The court of special appeals ruled that the defendant was a state official, thereby barring the plaintiff's § 1983 action. *Id.* Because the plaintiff did not challenge this holding, and because she had expressly stated in her brief that the defendant was acting as a state official, the court assumed in deciding the case that the sheriff was acting as a state official. *Id.* at 358, 597 A.2d at 438.

107. *Ritchie*, 324 Md. at 351-52, 597 A.2d at 435.
108. *Id.* at 358-66, 597 A.2d at 439-42.
109. *Id.* at 368, 597 A.2d at 443.
110. *Id.* at 368, 597 A.2d at 444.
111. *Id.*
112. *Id.* at 375, 597 A.2d at 446-47.
113. *Id.* at 369, 597 A.2d at 444. "The theory that, in the absence of a statute, the State itself cannot be held liable in damages for acts which are unconstitutional rests on public policy and a theoretical notion of the 'State.'" *Id.* at 369, 597 A.2d at 444 (citing Weyler v. Gibson, 110 Md. 636, 654, 73 A. 261, 263 (1909)).

immunity precludes any damages actions against the state, absent legislation consenting to suit.[114] At this point, however, federal and state law diverge. Under federal law, the prohibition against suing the state for damages cannot be evaded by merely naming the state official responsible for implementing state policy.[115] If the official was merely carrying out state policy, and it was such policy that was the moving force behind the violation, then the suit would be deemed an official capacity action and would not be allowed.[116]

Maryland, however, does not recognize the distinction between official and individual capacity suits.[117] The court in *Ritchie* reiterated that it had "consistently held that a public official who violates the plaintiff's rights under the Maryland Constitution is personally liable for compensatory damages."[118] Liability may be imposed whether the unconstitutional actions "were in accordance with or dictated by government policy or custom"—official capacity, or if the unconstitutional acts were "inconsistent with government policy or custom"—individual capacity.[119]

C. *Allowance of Individual Immunities*

The *Ritchie* court stated that a defendant who violates a plaintiff's state constitutional rights "does not have the qualified immunity defense available in a § 1983 action."[120] The court cited *Clea v. City of Baltimore*,[121] a 1988 court of appeals decision, in which a police officer was held personally liable for an unconstitutional search of the plaintiff's home.[122] The officer, due to a mistake on his part, applied for a search warrant for the wrong house and searched the

---

114. *Id.* at 369, 597 A.2d at 444; *see also* Department of Natural Resources v. Welsh, 308 Md. 54, 66, 521 A.2d 313, 319 (1986); Dunne v. State, 162 Md. 274, 284-87, 159 A. 751, 755-56, *cert. denied*, 287 U.S. 564 (1932); Weyler v. Gibson, 110 Md. 636, 654, 73 A. 261, 263 (1909).
115. Edelman v. Jordan, 415 U.S. 651, 663 (1974).
116. *See supra* notes 59-64.
117. *Ritchie*, 324 Md. at 368, 597 A.2d at 144. "Both the defendant's arguments and the decision of the Court of Special Appeals assume than an official/individual capacity distinction, like that under § 1983, exists with regard to actions against individual public officials for damages grounded upon alleged violations of Maryland constitutional rights. That assumption is incorrect." *Id.*
118. *Id.* at 370, 597 A.2d at 445 (citing Clea v. City of Baltimore, 312 Md. 662, 680, 541 A.2d 1303, 1312 (1988)); Mason v. Wrightson, 205 Md. 481, 487, 109 A.2d 128, 131 (1954); Heinze v. Murphy, 180 Md. 423, 429, 24 A.2d 917, 920 (1942); Weyler v. Gibson, 110 Md. 636, 654, 73 A. 261, 263 (1909).
119. *Ritchie*, 324 Md. at 370, 597 A.2d at 445.
120. *Id.* at 374, 597 A.2d at 446.
121. 312 Md. 662, 541 A.2d 1303 (1988).
122. *Id.* at 684-85, 541 A.2d at 1314.

wrong house.[123] The officer was not allowed to claim good faith or qualified immunity for a constitutional violation.[124] The *Ritchie* court cited, with approval, a statement in *Clea* that "an official who violates an individual's rights under the Maryland Constitution is not entitled to any immunity."[125] This holding is in direct contrast to federal law, which does provide such immunities[126] and, depending on the extent of this difference, could provide a cause of action for damages under the state constitution in many cases when one does not exist under federal law.[127]

IV. EVALUATION OF STATE AND FEDERAL APPROACHES

Plaintiffs have never been able to sue the state or state officials for damages when their federal constitutional rights have been violated pursuant to state laws or policies.[128] This result has been strongly criticized for leaving injured innocent citizens without a remedy against harm by the state.[129] Leaving such victims uncompensated seems particularly unfair when compared to plaintiffs who have been injured by violations caused by local or municipal actions and can recover. This difference in result cannot be justified on public policy grounds. There is no rationale for protecting state treasuries while not affording the same protection to municipalities.

A. Federal

The difference between the federal treatment of states versus municipalities is primarily historical, dating back to an early broad reading of the Eleventh Amendment to the United States Constitution.[130] Although the Eleventh Amendment by its terms prohibits

---

123. *Id.* at 665, 541 A.2d at 1304.
124. *Id.* at 684-85, 541 A.2d at 1314.
125. *Ritchie*, 324 Md. at 373, 597 A.2d at 446 (citing *Clea*, 312 Md. at 684, 541 A.2d at 1314).
126. *See supra* notes 23-26, 75-85 and accompanying text.
127. *See infra* notes 155-85 and accompanying text.
128. *See infra* text accompanying notes 131-42.
129. *See* PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983) (advocating Congressional abrogation of states' Eleventh Amendment protection for constitutional violations); Akil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Frederic LeClerq, *State Immunity and Federal Judicial Power-Retreat From National Supremacy*, 27 FLA. L. REV. 361 (1975).
130. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

only suits against a state by citizens of another state, the Supreme Court held in *Hans v. Louisiana*[131] that all suits against a state are barred, even when brought by their own citizens.[132]

However, the Court has not allowed plaintiffs to avoid this bar merely by naming the state official responsible for implementing state policy.[133] The Court recognized that to do so would have virtually the same effect as removing the protection of the Amendment, since payment would ultimately come from the state treasury.[134] The Court has allowed suits against state officials for injunctions prohibiting the officials from implementing unconstitutional state policies,[135] and suits against state officials in their individual capacity, where they were alleged to have acted beyond or in violation of state policies.[136] But neither of these exceptions violate the fundamental premise of the Eleventh Amendment, to restore state sovereignty and to protect state treasuries from attack, absent the state's consent.[137] The allowance of injunctive relief against state officials was a compromise necessary to ensure that states could be forced to comply with the Constitution, while not holding them liable for any past harm.[138]

Likewise, the allowance of suits against state officials in their individual capacity would also not affect the state treasuries, since such damage awards would be paid by the officials personally, and

---

131. 134 U.S. 1 (1890).
132. *Id.* at 20-21.
133. Edelman v. Jordan, 415 U.S. 651, 663 (1974).
134. *Id.* "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945).
135. *Ex parte* Young, 209 U.S. 123 (1908).
136. Scheuer v. Rhodes, 416 U.S. 232 (1974).
137. This is the "immunity" interpretation adopted by the Supreme Court in Hans v. Louisiana, 134 U.S. 1 (1890), and accepted by a majority of the Court since then. PETER LOW & CALVIN JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS (2d ed. 1989). The conflicting "diversity" interpretation, more faithful to the constitutional language, would bar only diversity suits based on state law causes of action. This view was espoused by Justice Brennan in Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 289-90 (1985); *see also*, Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977).
138. Nonetheless, the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984). As Justice Brennan observed, "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." Perez v. Ledesma, 401 U.S. 82, 106 (1971).

not the state.[139] Such personal liability is not unfair, since officials are personally liable only for exceeding their authority and are otherwise protected by qualified immunity unless their actions violate a settled constitutional right of which they should have been aware.[140] It is true that many government entities indemnify or insure their officials against many such personal judgments,[141] but the decision to do so, since voluntary, is not an intrusion into state sovereignty. States have always been able voluntarily to waive their protection under the Eleventh Amendment.[142]

The Supreme Court revisited the question of whether states may be held liable for constitutional violations in 1976.[143] The Court, interpreting an extension of Title VII[144] to state employers, held that Congress, when acting pursuant to its powers under section five of the Fourteenth Amendment, could abrogate a state's protection under the Eleventh Amendment.[145] This logically led to the question of whether Congress, by enacting Section 1983, had chosen to abrogate the states' immunity from suit. The Court, in *Quern v. Jordan*,[146] held that Congress had not clearly indicated on the face of the statute an intention to "sweep away" the states' immunity and that it therefore remained intact.[147]

The most recent case involving state liability under Section 1983 is *Will v. Michigan Department of State Police*.[148] In this case, suit was brought under Section 1983 against the state police in state court, rather than federal court, so that the Eleventh Amendment was not an obstacle to liability.[149] The *Will* Court held that Congress had not

---

139. [I]t is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the government entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense.

Kentucky v. Graham, 473 U.S. 159, 167-68 (1985).

140. *See supra* notes 79-81 and accompanying text.

141. PETER LOW & CALVIN JEFFRIES, CIVIL RIGHTS ACTIONS 49 (1988); *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979).

142. *See supra* note 57.

143. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

144. 42 U.S.C. § 2000e *et seq.* (1988).

145. *Fitzpatrick*, 427 U.S. at 456 (1976).

146. 440 U.S. 332 (1979).

147. Section 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability or shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. *Id.* at 332.

148. 491 U.S. 58 (1989).

149. *Id.* at 63-64.

intended states to be "persons" under Section 1983.[150] This result seemingly contradicts with the *Monell* holding that municipalities were to be considered persons under Section 1983.[151]

The result, in *Will*, was reached through historical evaluation, looking at the intent of the Congress that had passed Section 1983, and not to whether states, as a matter of policy, should be held responsible for constitutional violations.[152] Therefore, plaintiffs in federal court cannot avoid the official capacity defense by suing the state officer responsible for enforcing the unconstitutional rules in his official capacity. State officials, sued in their official capacity, are not considered persons subject to a Section 1983 suit for damages.[153] However, state officers are considered persons for purposes of a suit for injunctive relief.[154] Although this may make no logical sense, it preserves what has been the status quo for many years.

---

150. *Id.* at 65. This result, although not dictated by the Eleventh Amendment, was certainly influenced by it:

> This does not mean, as petitioner suggests, that we think that the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are. But in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it.

Id. at 66-67. The Court held that Congress had intended § 1983 to be enforced primarily in the federal courts, so that plaintiffs could avoid having to file suit in state courts. *Id.* at 66. Congress, knowing that state liability was prohibited in the federal courts, would not have "intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983." *Id.*

151. Monell v. Department of Social Servs. of New York, 436 U.S. 658, 690 (1978). "But it does not follow that if municipalities are persons then so are States. States are protected by the Eleventh Amendment while municipalities are not, and we consequently limited our holding in *Monell* 'to local government units which are not considered part of the State for Eleventh Amendment purposes.'" *Will*, 491 U.S. at 70.

152. *Will*, 491 U.S. at 65-69.

153. Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the [state] official's office. . . . We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device.

> We hold that neither a State nor its officials acting in their official capacities are "persons" under § 1983.

Id. at 71.

154. The Court held that a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); *Ex parte* Young, 209 U.S. 123 (1908).

B. State

The Court of Appeals of Maryland has reached a different conclusion for claims brought under the Maryland Constitution by refusing to recognize the distinction between official capacity and individual capacity suits.[155] As under federal law, claims against the state itself are barred, not by the Eleventh Amendment, but by the common-law doctrine of sovereign immunity.[156] Only the legislature can change this result, through legislation waiving the immunity.

Suits against individuals, however, are another matter. The court of appeals made clear that the state's sovereign immunity does not extend to any state officials who have injured one of the state's citizens through a constitutional violation.[157] "To do so would 'create a privileged class, free from liability for wrongs inflicted or injuries threatened.'"[158] This reasoning makes sense when applied to suits for individual actions in excess of an official's authority, for in that case it is his or her own wrongdoing which has caused the harm. It does not make sense, however, to hold a state official personally liable for merely carrying out or enforcing state law, when it is the law itself that causes the violation.

Holding the state official personally accountable for enforcing an unconstitutional state law could result in grave injustice in many cases. For example, it is hard to imagine that the Secretary of the Department of Human Resources would be personally responsible for millions of dollars in damages by implementing an unconstitutional state welfare statute. Yet there is no other way to read the *Ritchie* opinion. The court of appeals cites with approval the case of *Wyler v. Gibson*,[159] "where the Warden of the Maryland Penitentiary was held personally liable for an encroachment on the plaintiffs' land caused by an expansion of the Penitentiary. The expansion of the Penitentiary was authorized by a statute which specified the areas of its expansion and authorized condemnation."[160]

What is a state official supposed to do when confronted with a duty under state law to implement a possibly unconstitutional state statute? Technically, since federal law is supreme, the official should refuse to carry out the unconstitutional statute. Is it fair, however, to confront a state official with the choice of either ignoring state law and possibly losing his or her job, or, on the other hand,

---

155. Ritchie v. Donnelly, 324 Md. 344, 373-74, 597 A.2d 432, 446 (1991); *see supra* notes 117-19 and accompanying text.
156. *Ritchie*, 324 Md. at 369, 597 A.2d at 444.
157. *Id.* at 369-70, 597 A.2d at 444.
158. *Id.* at 369, 597 A.2d at 444 (quoting Dunne v. State, 162 Md. 274, 285, 159 A. 751, 755 (1932)).
159. 110 Md. 636, 73 A. 261 (1909).
160. *Ritchie*, 324 Md. at 371, 597 A.2d at 445.

implementing a potentially unconstitutional statute and becoming personally liable in damages if it does turn out that the statute is unconstitutional?

This choice is particularly disturbing when coupled with the second part of the *Ritchie* holding, that state officials are not entitled to qualified immunity from damages.[161] Under federal law, an official cannot be held liable unless the constitutional right in question had been established at the time that the official took action.[162] Applying the *Ritchie* holding, an official could be held liable for implementing a state statute later held unconstitutional, even if the official had no reason to know of its unconstitutionality at the time that he or she took action.

If public officials are held liable in such situations, many people may be unwilling to serve in public positions. In fact, although the judgment would be entered against the individual official, it is inconceivable that the state would not indemnify an official who was held liable merely for carrying out an unconstitutional state statute. It would be extremely unfair for the state not to indemnify the official in such circumstances.

If it is the state, as it must be, and not the individual who will eventually pay in such circumstances, then the *Ritchie* opinion is nothing more than a sleight of hand. The court of appeals has, in effect, abolished state sovereign immunity from damages while avowing that only the legislature has the power to do so.[163]

Actually, the reasoning of the *Ritchie* opinion is virtually identical with the reasoning of the federal case of *Ex parte Young*,[164] where the Supreme Court held that a suit against a state official is not in actuality a suit against the state.[165] The difference, albeit a large one in practical terms, is that the United States Supreme Court has limited this holding to suits for injunctive relief.[166] The *Ritchie* opinion also extends it to cases for damages.[167]

---

161. *See supra* note 120 and accompanying text.
162. *See supra* notes 79-81.
163. *Ritchie*, 324 Md. at 374 n.14, 597 A.2d at 446-47 n.14.
164. 209 U.S. 123 (1908).
165. In *Ex parte* Young the Supreme Court held that when a state official acts to enforce an unconstitutional statute, "[i]t is simply an illegal act upon the part of a state official" who is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 159-60.

    Compare this language to the language in the *Ritchie* opinion, which holds that "[w]hen the State's agents act wrongly, their acts are ultra vires, and it is '[t]he mere wrong and trespass of those individual persons . . . .'" *Ritchie*, 324 Md. at 369, 597 A.2d at 444 (quoting Poindexter v. Greenhow, 114 U.S. 270 (1885).
166. *Ex parte* Young, 209 U.S. at 159-60.
167. *Ritchie*, 324 Md. at 374, 597 A.2d at 446.

It must be noted, however, that this part of the *Ritchie* opinion could be considered dicta.[168] The actual facts in *Ritchie*, of course, do not involve what would be in federal parlance an official capacity suit, but rather an individual capacity suit.[169] There was no state statute that forced the sheriff to fire the plaintiff. The allegations were that the sheriff treated Ritchie differently because of her sex.[170] If these allegations were proven, it might not be unfair to subject the sheriff to personal liability.

It must also be noted that the *Wyler* case,[171] relied on by the *Ritchie* court for establishing the proposition that a state official would be personally liable for carrying out an unconstitutional state statute,[172] did not actually involve the award of compensatory damages against the official in such a case. Although the *Ritchie* court reported that the warden in *Wyler* was held personally liable,[173] the suit in *Wyler* was for ejectment, not for damages.[174] The plaintiff in *Wyler* received a judgment for the return of the property and only nominal damages.[175] There was no monetary judgement against the warden.

In fact, none of the cases cited by the court in *Ritchie* for the proposition that a public official who violates the plaintiff's constitutional rights is liable in damages[176] involved a situation where a public official was held liable for damages by carrying out official policy. In *Clea v. City of Baltimore*,[177] police officers carried out an unconstitutional search.[178] The search was done by mistake and not pursuant to official policy,[179] so it would have been an individual, not an official policy, suit. This was also the case in *Heinze v. Murphy*,[180] which involved an illegal arrest without probable cause.

Of all the cases, other than *Wyler,* cited by the *Ritchie* court, only *Mason v. Wrightson*[181] involved a public official who was carrying out official policy. In *Mason*, a police sergeant was held liable for an illegal search of a bar patron conducted pursuant to an order from the commissioner of police to search all suspicious

---

168. *See supra* note 167.
169. *See supra* notes 99-112 and accompanying text.
170. *Ritchie*, 324 Md. at 349, 597 A.2d at 434.
171. Weyler v. Gibson, 110 Md. 636, 73 A. 261 (1909).
172. *Ritchie*, 324 Md. at 371, 597 A.2d at 445.
173. *Id.*
174. *Weyler*, 110 Md. at 650, 73 A. at 262.
175. *Id.* at 651, 73 A. at 262.
176. *Ritchie*, 324 Md. at 371-73, 597 A.2d at 445-46.
177. 312 Md. 662, 541 A.2d 1303 (1988).
178. *Id.* at 665, 541 A.2d at 1304.
179. *Id.*
180. 180 Md. 423, 24 A.2d 917 (1942).
181. 205 Md. 481, 109 A.2d 128 (1954).

persons.[182] Because the patron was not harmed in the search, damages were only awarded in the sum of one cent.[183]

This is not to say that the court might not approve a large damages award against a state official for carrying out an unconstitutional state law, only that they have not yet actually done so. Clearly, by refusing to distinguish between individual and official capacity suits, the *Ritchie* court has set the stage for such awards. The court has decided, as a policy matter, that all persons harmed by unconstitutional state action should be entitled to compensation. This result is more equitable than the federal result of denying relief in such situations.

Unfairness would only result if the damage award in such cases were paid by the official personally. As discussed above, this will not likely be the case, because of voluntary indemnification by the state. There is another reason why the official, at least in many cases, might not be personally liable for the judgement. As noted in a footnote in the *Ritchie* opinion, the state legislature, as part of the Maryland Tort Claims Act,[184] has waived the state's immunity from certain tort actions and allowed the state to be substituted for the state official, who is granted immunity.[185] Thus, any discussion of this issue must include an examination of the Torts Claim Act and its effect on the holding in *Ritchie*.

V. THE MARYLAND TORT CLAIMS ACT

A. Application to State Officials

The court in *Ritchie* mentions the Maryland Tort Claims Act (hereinafter the State Act) only in a footnote at the end of the opinion while reviewing its holding as to governmental and personal liability.[186] The court first asserts that its conclusion—that the state is immune from unconstitutional acts and that the individual employee would be liable—could be changed by statute.[187] The court stated that

> [t]he General Assembly . . . could provide that the State will be liable for damages resulting from state constitutional torts such as those alleged by the plaintiff in this case, and that the individual employee will be immune. In other words,

---

182. *Id.* at 484-87, 109 A.2d at 129-31.
183. *Id.* at 488-89, 109 A.2d at 131-32.
184. MD. CODE ANN., STATE GOV'T §§ 12-101 to 12-204 (1993).
185. Ritchie v. Donnelly, 324 Md. 344, 375 n.14, 597 A.2d 432, 447 n.14 (1991).
186. *Id.*
187. *Id.* at 369, 597 A.2d at 444.

the Legislature may substitute state liability for individual employee liability.[188]

The court then recognized that the Maryland legislature had done "precisely this, under certain circumstances, in the Maryland Tort Claims Act."[189] The State Act waives the sovereign immunity defense of the state and grants immunity to the individual official for "tort actions generally,"[190] as long as the employee's actions were not malicious, grossly negligent, or outside the scope of employment.[191] The State Act, as amended in 1985, would encompass many constitutional claims. A 1989 bill that would have exempted state constitutional claims from the State Act did not pass.[192] The court remarked that the State Act did not apply to give immunity to the individual defendant in *Ritchie*, because there had been allegations of malice.[193] The court did indicate, however, that if the plaintiff failed to prove malice at trial, the defendant might plead the statutory immunity at that time.[194]

If the court's implication about the State Act is true, some of the unfairness of the results which would follow from application of the law as stated in the body of the opinion is corrected. State employees who were merely enforcing state law in good faith would not, in fact, be held personally liable for tortious injury caused by constitutional violations. But at the same time, injured plaintiffs in such cases would be allowed to recover from the state directly. State employees who acted maliciously would still be personally liable.

One must wonder why the court bothered to spend several pages of text laying out what the law would be in the absence of a statute, when a completely different result would be reached under the statute, which does, in fact, seem to apply in many cases. This is especially problematic since a plaintiff who followed the court's reasoning in *Ritchie*, and sued the individual rather than the state, might be left without any remedy if the official successfully claimed immunity under the statute. In such a case, it does not appear that the state could merely be substituted as a defendant after suit had been filed,

---

188. *Id.* at 374-75 n.14, 597 A.2d at 446-47 n.14.
189. *Id.*
190. *Id.* (quoting Simpson v. Moore, 323 Md. 215, 219, 592 A.2d 1090, 1092 (1991)). Prior to a 1985 Amendment, the State Act encompassed only a limited listed number of torts. The 1985 amendments made the State Act applicable to any torts, excluding only claims arising from the combatant activities of the State Militia during a state of emergency. MD. CODE ANN., CTS. & JUD. PROC. § 5-399.2(a) (1994).
191. MD. CODE ANN., CTS. & JUD. PROC. § 5-399.2 (1994).
192. *See* H. 364, 1989 Sess. (Md. 1989).
193. *Ritchie*, 324 Md. at 375, 597 A.2d at 447.
194. *Id.*

because the State Act requires that a notice of claim must be presented to the state treasurer within 180 days of the occurrence.[195]

Plaintiffs would be able to recover under the reasoning of the court's opinion[196] or under the State Act,[197] but only if they followed the appropriate procedures for the appropriate type of case. In cases where the unconstitutional action was made by the official in good faith, within the scope of his or her duty, the proper defendant would be the state, and the notice provisions of the State Act would have to be followed.[198] In cases where the official acted in bad faith, or was grossly negligent, or acted outside the scope of employment, suit would be proper only against the individual.[199] In fact, in many cases, the only safe course for a plaintiff to follow would be to sue both the state and the individual, because it may be impossible to determine at the onset of the suit whether any of the exceptions to the State Act applied. For example, in *Ritchie* the plaintiff had alleged malice on the part of the individual defendant.[200] As the court implied, however, if malice was not proved at trial, the defendant would be immune under the statute.[201] Unless the state had been included as a proper defendant at that time, it would be too late to add it.

One question not addressed by the court is what would happen if the amount of damages exceeded the waiver of immunity under the statute. Would the individual defendant be responsible for damages under the reasoning of *Ritchie* or would the defendant be completely protected by the immunity granted under the State Act?

Although the State Act does not contain a dollar limitation on the amount of damages, waiver of immunity is limited "to the extent

---

195. MD. CODE ANN., STATE GOV'T § 12-106 (1993). The 180 day notice requirement is significantly shorter than the normal limitations period for torts—three years for most negligent and some intentional torts, *see* MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (1994), and one year for assault, battery, libel, and slander, MD. CODE ANN., CTS. & JUD. PROC. § 5-105 (1994). Therefore, it is quite likely that if a plaintiff filed suit against the state employee who claimed immunity and had the suit dismissed, by the time the case was dismissed, the 180 day notice period would have expired. On the other hand, the state attorney general may, as a regular practice, allow the state to be substituted as a party when the plaintiff has incorrectly sued the state official personally. Interview with Carmen Shepard, Assistant Attorney General of Maryland (1994).

196. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (1994) (using the three year statute of limitations for individual tort actions).

197. MD. CODE ANN., STATE GOV'T § 12-106 (1994) (using the 180 day procedural requirement of the State Act).

198. *Id.*

199. *See supra* note 187.

200. Ritchie v. Donnelly, 324 Md. 344, 350 n.1, 597 A.2d 432, 435 n.1 (1991).

201. *Id.* at 375, 597 A.2d at 447.

of insurance coverage" held by the state.[202] The amount of this waiver has been set by the state treasurer at $50,000 per claimant for each injury.[203] At the same time, the immunity granted to the official by the State Act does not seem to have a similar monetary limit. Therefore, at least under the scheme of the State Act, it does appear that an injured plaintiff might go uncompensated for part of a large claim.

Given the *Ritchie* opinion, however, it is unclear whether such a result would be allowed by the court. This is because the court clarifies in *Ritchie* that absent a statutory provision, the official would be personally liable.[204] The purpose of this result is to avoid creating "'a privileged class, free from liability for wrongs inflicted or injuries threatened.'"[205] The *Ritchie* court indicates that it is up to the legislature to decide whether to waive the state's sovereign immunity.[206] The court also indicates that the individual liability recognized in *Ritchie* could be abolished by statute if the legislature substituted state for individual liability.[207] There is no discussion, however, of whether the legislature could grant the individual official immunity without the accompanying waiver of immunity so that an injured plaintiff could be compensated. It is unclear whether the Court of Appeals of Maryland would allow this result. On the one hand, to do so would create the same problem of leaving a plaintiff, who had been injured by the unconstitutional acts of a state official, uncompensated. On the other hand, there is no mention in the *Ritchie* opinion that the court's goal of compensating all such injured plaintiffs is itself constitutionally required. If it is not constitutionally required, then it might be subject to legislative control.

Furthermore, if the state could not grant individual immunity without substituting state liability, then it might not be able to have the individual's immunity exceed the state's waiver of immunity because of the same lack of compensation for constitutional injuries exceeding the waiver amount.[208]

---

202. MD. CODE ANN., STATE GOV'T § 12-104(a) (1993).

203. COMAR § 25.02.02.02 D (1). Judgments for more than this amount may be paid, but only with approval of "the Board of Public Works, with the advice and counsel of the Attorney General." MD. CODE ANN., STATE GOV'T § 12-104(c) (1993).

204. *Ritchie*, 324 Md. at 373-74, 597 A.2d at 446.

205. *Id.* at 369, 597 A.2d at 444 (quoting Dunne v. State, 162 Md. 274, 285, 159 A. 751, 755, *cert. denied*, 287 U.S. 564 (1932)).

206. *Id.* at 369, 597 A.2d at 444. "The doctrine of sovereign immunity precludes such a damages action against the 'State of Maryland' *absent legislation consenting to suit.*" *Id.* (emphasis added).

207. *Id.* at 374 n.14, 597 A.2d at 446-47 n.14.

208. An argument could be made that even if the legislature could not abolish the common-law right of action against the public official without substituting

If the limitation on state liability coupled with complete immunity for the state official is allowed to stand, how will this affect the *Ritchie* doctrine, especially those areas where under *Ritchie*, liability for violations of the state constitution exceeded that for violations of the federal constitution? The first question that needs to be answered is which claims for damages for violations of the Maryland Declaration of Rights would be considered tort actions, subject to the limitations of the Maryland Tort Claims Act.[209]

Some claims, such as claims for excessive force or for illegal search and seizure, would clearly be viewed as torts. Other claims, such as the failure to pay some public benefits due to an unconstitutional regulation, are not normally thought of as torts. A broad definition of torts, however, would encompass all violations of constitutional rights that resulted in harm to the plaintiffs.

Black's Law Dictionary defines a tort as a violation of a duty owing to the plaintiff, as long as that duty is imposed by law rather than by agreement of the parties, or a contract.[210] Because all suits brought for violation of constitutional rights involve a violation of a duty imposed by law, they would fall within the definition of a tort. The court in *Ritchie* seems to assume that the claims in that case, employment sex discrimination, would fall within the definition of the State Act.[211]

If the limitations of the State Act stand, the greatest impact will be on official capacity suits against state officials, where the harm is directly caused by implementation of an unconstitutional state policy. Under federal law, such claims are not allowed.[212] Under *Ritchie*, they are allowed without limitation.[213] If the present limitation of the State Act stands, such suits would be limited to $50,000.[214] This is still a better result than under federal law, but would present a barrier to very large claims.[215]

The limitations of the State Act will have no effect on the most egregious violations by state officials, those involving claims where the official has acted with actual malice. In such cases, no immunity

---

some state liability, it could substitute something less than full liability for all damages. The court of appeals has approved a damage cap of $350,000 for non-economic losses in medical malpractice cases. Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102 (1992).

209. *See Ritchie*, 324 Md. 344, 597 A.2d 432.

210. BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

211. *Ritchie*, 324 Md. at 375, 597 A.2d at 447.

212. *See supra* notes 56-58 and accompanying text.

213. *Ritchie*, 344 Md. at 375, 597 A.2d at 447.

214. *See supra* notes 202-03 and accompanying text.

215. Obviously, the extent of the impact of this restriction could only be known if the percentage of judgments for "official capacity" suits that exceed $50,000 were known. Such an inquiry is beyond the scope of this Article.

is granted under the statute and full damages may be awarded against the officials themselves.[216] That the State Act does not apply is a mixed blessing. Although the dollar limitation does not limit a plaintiff's recovery, the deep pocket of the state is not substituted to make a plaintiff's actual recovery more likely.[217] Although government officials are often insured or indemnified for constitutional violations, such protection often does not cover claims involving malice or punitive damages.[218]

Although recovery under Section 1983 may also be allowed in some cases, recovery under state law may be important, because it may not always be allowed under federal law, due to the official's qualified immunity. Qualified immunity under federal law is no longer determined by whether the official acted in good faith or bad faith—malice. Even if the official acted maliciously, he or she is protected by the immunity unless the constitutional right in question was "clearly established" at the time of the actions.[219] Therefore, in a situation where a plaintiff is injured by the malicious actions of a government official whose conduct is a violation of a constitutional right that was not clearly established until after those actions, the plaintiff could recover under state, but not federal law.

The *Ritchie* doctrine, even if subject to the limits of the State Act, will also prove helpful to some plaintiffs injured by the non-malicious, individual actions of state officials. This results from the fact that state law does not recognize the qualified immunity granted to public officials in individual capacity actions under Section 1983.[220] The impact of state law in such situations might arguably be greater than in those involving malicious action as discussed above. This is because even though federal immunity is not based on whether the defendant acted maliciously or not, it is more likely that a defendant who acted maliciously would have violated a settled constitutional right than one who acted in good faith.[221] Therefore, the good faith

---

216. The State Act requires that the employee act "in good faith" and "not in a reckless, wanton, or grossly negligent manner" to receive the immunity. MD. CODE ANN., CTS. & JUD. PROC. § 5-399.1(c) (1994).

217. Under the State Act, the waiver of governmental immunity is supposed to coincide exactly with the granting of individual immunity. Therefore, when *Ritchie* is read in concert with the State Act, it is clear that liability for constitutional violations will always lie either with the government or with the individual, depending on the circumstances, but not with both.

218. *See* PETER LOW & JOHN JEFFRIES, CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 49 (1988).

219. *See supra* note 88.

220. *See* discussion *supra* part III.C.

221. This is because an official acting with malice would be more likely to disregard plaintiffs' constitutional rights, even if they were so well settled that the official would have known of them. An official acting in good faith would not, at least purposely, violate plaintiffs' rights.

defendant is more likely to retain his or her federal qualified immunity, and suit under state law, even if limited by the State Act, might be the only recovery allowed.

B. Application to Local Government Officials

The court in *Ritchie* assumed for the purpose of deciding the case, that the defendant county sheriff was a state employee rather than a local government employee.[222] While recognizing the distinction under federal law between state and local officials,[223] the court did not make such a distinction in the section of the opinion dealing with suits under the Maryland Constitution.[224]

The court referred to the liability of public officials[225] and government officials,[226] not to state or local officials. There is nothing, in either the language or the reasoning of the opinion, that would limit its reach to state officials and not include local officials. Therefore, the holding that state officials would be liable in damages for violations of the state constitution[227] would seem to apply to local government officials as well.

However, the footnote recognizing the power of the legislature to substitute government for individual liability, through a tort claims act, would also seem applicable.[228] There is a Local Government Tort Claims Act[229] (hereinafter the Local Act) which is similar, but not identical, to the State Act.[230] As mentioned previously, the result of the State Act is to hold the individual liable for acts that were malicious or outside of the scope of employment, and to hold the state liable, up to a limit of $50,000, for non-malicious actions taken within the scope of employment.[231]

Because of differences in language and structure, the Local Act may not reach the same result. The Local Act holds local governments liable, up to a limit of $200,000 per individual claim and $500,000 per occurrence, "for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government."[232] This

---

222. Ritchie v. Donnelly, 324 Md. 344, 357-58, 597 A.2d 432, 438 (1991).
223. *Id.* at 356-57, 597 A.2d at 438.
224. *See id.* at 368-75, 597 A.2d at 443-47.
225. *Id.* at 370, 597 A.2d at 445.
226. *Id.*
227. *Id.* at 373-74, 597 A.2d at 446-47.
228. *Id.* at 374-75 n.14, 597 A.2d at 446-47 n.14.
229. MD. CODE ANN., CTS. & JUD. PROC. §§ 5-401 to 5-404 (1989 & Supp. 1994).
230. MD. CODE ANN., STATE GOV'T §§ 12-101 to 12-204 (1993).
231. *See supra* text accompanying notes 186-206 for a discussion of the results under the Maryland Tort Claims Act.
232. MD. CODE ANN., CTS. & JUD. PROC. §§ 5-403(a)-(b) (1994).

liability is derivative, and the government may assert any immunity or defense possessed by the employee on June 30, 1987, the effective date of the Local Act.[233] The local government may "only be held liable to the extent that a judgment could have been rendered against such an employee."[234]

Another section of the Local Act provides that "a person may not execute [a judgment] against an employee" for acts within the scope of employment unless the employee acted with actual malice.[235] It is important to note that the prohibition is against "executing" rather than obtaining the judgment.

The most reasonable interpretation of these sections when read together is that local government officials could be sued for all constitutional violations. If the official did not act with malice, the judgment could not be enforced against him or her personally, and only the government would be liable, up to the damage limitation. If the official acted with malice, the judgment could be enforced against the government, with a right of indemnification against the official,[236] or against the official personally.[237] This reading would make the results very similar to the results in a suit under the State Act, with the following differences: Under the State Act, if the official acted maliciously, only the official would be liable.[238] Under the Local Act, if the official acted maliciously, both the official and the government would be liable, but the government could sue the official for indemnification.[239] Under both acts, if the official did not act maliciously, only the government would be liable.[240] The difference in non-malicious actions would only be the amount of liability, which is considerably higher under the Local Act.[241]

This result is complicated, however, by another statute that was passed in 1990.[242] Part of the statute, which deals with numerous

---

233. MD. CODE ANN., CTS. & JUD. PROC. § 5-403(e) (1994).
234. *Id.*
235. MD. CODE ANN., CTS. & JUD. PROC. § 5-402(b) (1994).
236. MD. CODE ANN., CTS. & JUD. PROC. § 5-402(b)(2)(ii) (1994).
237. There is, of course, an alternative reading. If the section prohibiting a person from executing a judgment against an official who acted without malice were read as an immunity from judgment, then in such cases the governmental entity would also be immune, since its liability is derivative and dependant on a judgment against the individual. It does appear, however, that the language of "execute" rather than "enter" a judgment was deliberate, in order to avoid just this result.
238. *See supra* text accompanying notes 216-17.
239. MD. CODE ANN., CTS. & JUD. PROC. § 5-402(b)(2)(ii) (1994).
240. *See supra* notes 216-17, 235-37 and accompanying text.
241. *Compare supra* note 232 and accompanying text *with* notes 202-03 and accompanying text.
242. MD. CODE ANN., CTS. & JUD. PROC. § 5-321 (1994).

issues of governmental immunities, provides that "[a]n official of a municipal corporation, while acting in a discretionary capacity, without malice, and within the scope of the official's employment or authority shall be immune as an official or individual from any civil liability for the performance of the action."[243]

Unlike the provision of the Local Act, which is merely a prohibition against *executing* a judgment against the official personally,[244] this provision holds the official "immune"—presumably meaning that no judgment could be entered against the official.[245] This in turn would also destroy the government's derivative liability, since it is only liable "to the extent that a judgment could have been rendered" against the employee.[246]

This was the position of the Court of Special Appeals of Maryland in the case of *Davis v. Dipino*.[247] The court dismissed state constitutional claims against both an officer of the Ocean City Police Department and against the City, because there was no showing that the officer had acted maliciously and therefore suit was barred by the immunity provided by section 5-321 of the Maryland Courts and Judicial Proceedings Code.[248]

It is not entirely clear, however, whether the passage of the 1990 immunity statute was meant to have the effect of removing not only individual, but also governmental immunity under the Local Act. Given this interpretation, this section greatly reduces the coverage of the Local Act. There would be no liability, either personal or governmental, for any constitutional violations committed while an official was acting in good faith. This, of course, runs counter to the reasoning of *Ritchie*.

The only governmental liability allowed under the Local Act would occur if the official acted with malice, when he or she would have been liable anyway. The only positive effect of the Local Act for victims, therefore, would be to provide an alternative deep pocket defendant for constitutional violations that had been committed with malice.

A more sensible reading of the 1990 immunity clause would be that it was enacted to make certain that public officials could not be held *personally* liable for non-malicious actions. If the legislature had intended to remove governmental liability as well as personal

---

243. MD. CODE ANN., CTS. & JUD. PROC. § 5-321(b)(1) (1994).
244. MD. CODE ANN., CTS. & JUD. PROC. § 5-402(b) (1994).
245. MD. CODE ANN., CTS. & JUD. PROC. § 5-321 (1994).
246. MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (1994).
247. 99 Md. App. 282, 637 A.2d 475 (1994).
248. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-321 (1994).

liability, it is likely that they would have made this clear, rather than relying on the fact that immunizing the official would also immunize the government.

If the restrictive reading of the *Davis* court prevails, it will make recovery for violations of the state constitution committed by local officials more difficult. It must be remembered, however, that unlike the situation with state officials, recompense may already be had under Section 1983 for violations of federal law committed by local officials acting in their official capacity. If the local official was acting pursuant to official government policy, suit may be brought against the government itself.[249] Additionally, if the local official was acting in an individual capacity, suit could be maintained under Section 1983 if the right in question had previously been clearly established.[250] Also, if the official had acted with malice, suit could be maintained under the Local Act.[251]

The only gap in liability would occur where the official had acted in an individual capacity, not pursuant to government policy, but without malice, and had violated a right which had not been clearly established at the time of the harm. In this case, under the reasoning of the court of special appeals, neither the official nor the government would be liable. It might be unfair to hold the official liable in such circumstances, but it might be appropriate to provide for government liability. This is the result under the State Act, and was the result under the Local Act, absent the 1990 immunity statute.

VI. FILING IN STATE VERSUS FEDERAL COURT

A plaintiff who wishes to assert both federal and state constitutional claims faces the choice of whether to file suit in state or federal court. State claims may be asserted in federal court through the doctrine of pendent, or supplemental jurisdiction.[252] This doctrine allows plaintiffs to bring state claims into federal court as long as they are so related to the federal claims "that they form part of the same case or controversy under Article III of the United States Constitution."[253] By the same token, a plaintiff may bring Section

---

249. *See supra* note 19 and accompanying text.
250. *See supra* text accompanying notes 73-81.
251. *See supra* note 239 and accompanying text.
252. Pendant jurisdiction, a doctrine developed by the federal courts, allowed a plaintiff who was asserting a federal claim in federal court, to assert a state claim against the same defendant, if it arose out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Pendant jurisdiction has recently been codified and merged with its cousin, ancillary jurisdiction, under the new term, supplemental jurisdiction. 28 U.S.C. § 1367 (1994).
253. 28 U.S.C. § 1367(a) (1994).

1983 claims in state, as well as federal court.[254] In fact, state courts may not refuse to hear, or otherwise discriminate, against Section 1983 claims.[255]

There are many factors that might lead litigants to prefer having their case heard in state versus federal court.[256] A general discussion of the relative merits of the two court systems is beyond the scope of this Article. What needs to be discussed here, however, are the options that are open to the litigants, especially in those situations where liability under state law may exceed that under federal law.

Where liability under both state and federal law is identical, the situation is relatively straightforward. For example, consider the situation of a state police officer who, savagely and without cause, beats a suspect taken into custody. In this situation, the officer has clearly violated the settled constitutional rights of the plaintiff under both the federal and state constitutions. Also, under both Section 1983 holdings and the *Ritchie* opinion, the officer would be liable for the damages personally.[257]

In such a case, the plaintiff could file both claims in federal court.[258] The plaintiff could also file both claims in state court, but in that case the defendant could have the case removed to federal court if he or she desired.[259] If the plaintiff preferred to have the case heard in state court, he or she would have to forgo the federal claims and pursue only the state claims. That would also mean forgoing the possibility of receiving an award of attorney's fees, which may accompany a successful Section 1983 claim.[260]

---

254. *See* Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980); Martinez v. California, 444 U.S. 277, 283-84 n.7 (1980).

255. *See* Howlett v. Rose, 496 U.S. 356 (1990) (holding that state courts cannot refuse to hear § 1983 claims brought in a court otherwise competent to hear that type of claim).

256. For a thorough analysis of the rationale for and against bringing a § 1983 claim in state versus federal court, *see* STEVEN H. STEINGLASS, STATE COURT § 1983 LITIGATION: AN INTRODUCTORY COURSE FOR STATE COURT JUDGES (1992); STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS (1989); *see also* Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057 (1989).

257. *See* Ritchie v. Donnelly, 324 Md. 344, 373-74, 597 A.2d 432, 446-47 (1991); *supra* notes 73-74 and accompanying text.

258. Jurisdiction over the federal claim would be based on 28 U.S.C. § 1331 or § 1343 (1994). Jurisdiction over the state law claim would be based on 28 U.S.C. § 1367 (1994).

259. 28 U.S.C. § 1441 (1994), allows a defendant to remove to federal court any civil action over which the district courts have original jurisdiction.

260. The Civil Rights Attorneys' Fees Award Act of 1976, codified as part of 42 U.S.C. § 1988 (1994), allows prevailing plaintiffs in a § 1983 action to recover reasonable attorneys' fees. Such fees may be awarded whether the § 1983 claim is brought in state or federal court, Maine v. Thiboutot, 448 U.S. 1, 8 (1980), but are not available in state court for common-law claims brought under the Maryland Constitution.

The results are also quite straightforward when a plaintiff wishes to assert a claim allowable under *Ritchie* that would not be allowable under Section 1983—for example, a complaint against a state official acting in his or her official capacity. Such a case could be brought only in state court.

The choice becomes somewhat more problematic in a situation where the plaintiff's federal law claim might be barred by the defendant's qualified immunity. It is not always clear at the outset of the litigation whether the plaintiff's constitutional rights had been "clearly established" enough to avoid the immunity. In this type of case, the defendant will likely move for summary judgment on the federal claims relying on immunity grounds. Federal courts have been instructed to deal with this defense by motion for summary judgment before trial.[261] If summary judgment is granted as to the federal claims, the court has discretion to dismiss the supplementary state claims, and will in most instances do so.[262] The plaintiff would then have to refile the state claims in state court. Although this is a procedural inconvenience, it will not be fatal to the plaintiff's claims since the federal supplemental jurisdiction statute has a provision that tolls the statute of limitations for pendant state claims dismissed by the federal court.[263]

If the plaintiff wished to avoid the possibility of the inconvenience of refiling in state court, he or she could file both federal and state claims in state court. This may not work, however, since the defendant could first remove the entire case to federal court, then move for summary judgment on the federal claim, then have the state claim dismissed for lack of subject matter jurisdiction. This would force the plaintiff to refile the state claims back in state court where he or she had started some months before.

The bottom line is that the *Ritchie* holding, insofar as it extends liability beyond that provided by federal law, will be applied, in the main, by state, not federal courts.

VII. EFFECT ON ABSOLUTE IMMUNITY

One question left unanswered by the *Ritchie* opinion is whether state officials exercising legislative, judicial, or prosecutorial functions

---

261. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

262. The supplemental jurisdiction statute provides that the court may decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3) (1994). The earlier such a dismissal occurs in the lawsuit, the more likely the court will dismiss the state law claims. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966). For an example of a case where a federal court dismissed Maryland constitutional law claims after finding that the parallel federal claims had been barred by qualified immunity, see Jackson v. Bostick, 760 F. Supp. 524, 532 n.6 (D. Md. 1991).

263. 28 U.S.C. § 1367(d) (1994).

enjoy the same absolute immunity from damages for state constitutional claims as they do from federal claims. *Ritchie* involved a sheriff exercising executive functions, who under federal law would have received only qualified immunity.[264] The *Ritchie* opinion makes clear that such a qualified immunity defense is not available under state law against a state constitutional claim.[265] Both the reasoning of the opinion and, at one point, even the language would seem to apply to absolute immunities as well.[266] If that were the case, then plaintiffs could sue judges and prosecutors for constitutional violations, which they have never been able to do under federal law. This would have been a somewhat surprising result given the firm entrenchment of such immunities.

In its most recent opinion on the subject, however, the court of appeals has made clear that absolute judicial immunity remains firm, even against claims brought under the Maryland Constitution.[267]

In *Parker v. State*,[268] the plaintiff brought suit against a circuit court judge who mistakenly issued an arrest warrant for her on charges for which she had already been acquitted, without checking the case file or docket entries.[269] She brought a Section 1983 claim against the judge and a claim against the state under the State Tort Claims Act, alleging false imprisonment, false arrest, and negligence on the part of the judge.[270]

In discussing the state's liability for the Torts Act claim, the court first noted that all parties agreed that since liability under the Tort Claims Act was derivative, if Judge Brown was entitled to absolute judicial immunity, then the state would not be liable under the Act.[271] The court also noted that plaintiff had asserted only nonconstitutional state law torts and had not specifically asserted

---

264. Ritchie v. Donnelly, 324 Md. 344, 360, 597 A.2d 432, 440 (1991).
265. *Id.* at 373-74, 597 A.2d at 446.
266. At one point in the opinion, the *Ritchie* court indicates that a public official is not entitled to "the *qualified* immunity defense available in a § 1983 action." *Ritchie*, 324 Md. at 374, 597 A.2d at 446 (emphasis added). At another point, however, the court cites with approval language from Clea v. City of Baltimore that "an official who violates an individual's rights under the Maryland Constitution is not entitled to *any* immunity." *Id.* at 373, 597 A.2d at 446 (quoting Clea v. City of Baltimore, 312 Md. at 684, 541 A.2d at 1314 (emphasis added)). This "any immunity" language, cannot be taken as too strong an indication that the court was abolishing absolute immunity, however, since both *Clea* and *Ritchie* involved situations where the official would have received no more than qualified immunity.
267. Parker v. State, 337 Md. 271, 653 A.2d 436 (1995).
268. *Id.*
269. *Id.* at 437.
270. *Id.* at 437-38.
271. *Id.* at 438.

violations of the Maryland Constitution.[272] The court made clear, however, that "in light of the scope of judicial immunity under Maryland law, the result would be no different if we construed Parker's allegations as setting forth a cause of action for violation of Article 24 or 26 of the Maryland Declaration of Rights."[273]

The court reviewed the doctrine of judicial immunity under English common law, federal law, and Maryland law, and found that it had been firmly established since 1607.[274] It held that under Maryland law, judges were absolutely immune from civil liability for their judicial acts.[275] The court specifically distinguished qualified public official immunity, which was not available against claims for intentional torts or for violations of the Maryland Constitution, from absolute judicial immunity, which applied broadly to all civil claims for damages.[276]

The holding in *Parker* leaves plaintiffs who have been injured by the unconstitutional actions of judges without a civil damage remedy under either federal or state law. This result is not surprising, and, in fact, a contrary result would have been quite revolutionary. Although the court's opinion addresses only absolute judicial immunity and not absolute prosecutorial or legislative immunity, there

---

272. *Id.* at 438 n.2.

273. *Id.*

274. *Id.* at 439 (citing Floyd v. Barker, 12 Coke 23, 77 E.R. 1305 (1607)).

275. *Id.* at 442.

276. *Id.* at 443. The court distinguished public official immunity and judicial immunity on both an historical basis and a policy basis. As to history, the court noted that

> while "a public official who violates a plaintiff's rights under the Maryland Constitution is entitled to no immunity," Clea v. City of Baltimore, 312 Md. 662, 680, 541 A.2d 1303, 1312 (1988); Weyler v. Gibson, 110 Md. 636, 73 A. 261 (1909), judicial immunity at common law encompasses claims based upon the deprivation of constitutional rights. *See, e.g.*, Bradley v. Fisher, . . . 13 Wall. [335,] 356-57, 20 L.Ed. [646,] 652 [1872]; Hamond v. Howell, . . . 2 Mod. [218,] 220-21, 86 E.R. [1035,] 1037 [1677].

Id.

In distinguishing the qualified immunity of public officials from absolute judicial immunity, the court stated:

> Unlike other public officials, judges are required, on a daily basis, to make numerous decisions in disputes between adverse parties. With respect to each judicial decision, there is a winner and a loser. Furthermore, what is won or lost often has great value to the litigants: the custody of children, compensation for serious injuries, freedom from physical restraint, or simply large sums of money. With such important issues at stake in an adversarial context, absolute immunity is needed to forestall endless collateral attacks on judgments through civil actions against the judges themselves.

Id.

is every reason to believe that these immunities will also be retained.

VIII. CONCLUSION

In certain circumstances, citizens injured by the unconstitutional actions of state officials may be able to recover damages under state law in situations where they have not been able to recover under federal law. Where a state official violates a plaintiff's rights under the Maryland Constitution while carrying out official state policy, the plaintiff will be able to recover, at least up to $50,000. This result corrects a longstanding inequity under federal law which holds a plaintiff without remedy in such a situation. Recovery may also be had for individual constitutional violations committed by state officials, even when the constitutional right in question had not been clearly established at the time of the violation. This corrects an inequity in federal law of a more recent vintage. In both cases, the damages would be paid by the state, rather than by the official personally, as long as the actions had been taken in the course of the official's duties and without malice. This guarantees that unfairness to the plaintiff is not remedied at the expense of unfairness to the state official.